No. 10654

In the United States Circuit Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

PUGET SOUND POWER AND LIGHT COMPANY, A CORPORATION, APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

REPLY BRIEF FOR THE UNITED STATES

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ARGUMENT

In this reply brief the Government will discuss each of appellee's eight contentions seriatim.

APPELLEE'S POINT I

We agree that public utility franchises are private property. Business, goodwill, and contracts are likewise private property. We also agree that when such property is actually "taken" the owner is protected by the Fifth Amendment. See *Louisville* v. *Cumberland Tel. & Tel. Co.,* 224 U. S. 649 (1912); *Owensboro* v. *Cumberland Tel. & Tel. Co.,* 230 U. S. 58 (1913);

Los Angeles v. *Los Angeles Gas & Electric Corporation,* 251 U. S. 32 (1919); *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312 (1893), cited by appellee (Br. 3–4). But, as pointed out in the Government's opening brief, pages 13–14, 16–18, when the Government condemns "land," and not the "business" thereon, it is not liable for the attendant loss of business opportunities nor for the frustration of private contracts. One must have an actual interest in the land taken to share in the compensation. *Chicago, M., St. P. & P. R. Co.* v. *Chicago, R. I. & P. Ry. Co.,* 138 F. 2d 268 (C. C. A. 8, 1943), certiorari denied January 10, 1944. Therefore, unless the franchise from King County conferred on the appellee a property right in Bile Street no compensation is due the appellee under the Fifth Amendment for consequential losses.

APPELLEE'S POINT II

Appellee ignores the distinction between an easement and a license (Br. 4–9). Manifestly, it would be an extreme overstatement to assert that whenever a license to enter upon and use land is acted upon and equipment placed on the land pursuant thereto an "interest in land" is acquired. The user of a ticket to a race-track spectacle (*Marrone* v. *Washington Jockey Club,* 227 U. S. 623 (1913)), or a theatre performance (*Hurst* v. *Picture Theatres, Ltd.* (1915), 1 K. B. 1), acquires no "interest in land" as that term is commonly understood, though entitled to remain upon the land for the time being as contemplated by the arrangement. It has been well said that

"both theatre proprietor and theatre patron would be surprised to learn that the purchase of a ticket 'to see a show' was a sale of land." Clark, *Covenants and Interests running with the Land* (1929), p. 42. A concessionaire holding a valuable exclusive privilege for the sale of refreshments and of advertising space in a theatre building acquires no interest in the building for which he can recover compensation from a party entitled to condemn who takes over the building. It was said in such a case that a license to carry on the concessionaire's trade on the land did not confer an interest in the land. *Warr* v. *London County Council* (1904), 1 K. B. 713. Likewise a contract right to use another company's railroad right-of-way is not an interest in land entitling such user to share in a condemnation award. *Chicago, M., St. P. & P. R. Co.* v. *Chicago, R. I. & P. Ry. Co.,* 138 F. 2d 268 (C. C. A. 8, 1943), certiorari denied January 10, 1944.

The Washington Supreme Court has repeatedly held that the electric street railway's franchise to operate its service in the city streets is not an interest in land against which, under local statutes, assessments for benefits incident to street improvements can be made. *City of Seattle* v. *Seattle Elec. Co.,* 48 Wash. 599, 94 Pac. 194 (1908); *In re City of Seattle,* 49 Wash. 109, 94 Pac. 1075, 1079 (1908); *In re City of Seattle,* 54 Wash. 460, 103 Pac. 807, 808 (1909). In *Washington Water Power Co.* v. *Rooney,* 3 Wash. 2d 642, 101 P. 2d 580, 583 (1940), the court stated that "a franchise is a grant of a right to conduct a specific business in the streets." The privilege to occupy land under a

license is not such an interest in the land itself that a licensee can recover compensation for it from a condemner of the land. *Clapp* v. *City of Boston,* 133 Mass. 367 (1882). See also *Sabine & E. T. Ry. Co.* v. *Johnson,* 65 Tex. 389 (1886) (license to graze cattle on another's land does not confer any interest in the land); *Taylor* v. *Gerrish,* 59 N. H. 569 (1880), (license to install connection with spring on another's land conferred no interest in the land). A contract for a license to use real estate which does not amount to an easement may be oral and does not have to satisfy the Statute of Frauds as to contracts for interests in land. Williston on Contracts, sec. 493, with numerous authorities cited, including cases holding that contracts to erect buildings or other structures upon land are not within the Statute of Frauds, although the structures when completed will be real estate.

Mere verbal definition of the terms "easement" and "license" shows considerable overlapping in the content of these two terms, as witness Tiffany on Real Property, sec. 756, defining an easement, and sec. 829, defining a license. In both cases is involved the privilege of doing a certain class of act on another's land. The holder of an easement, however, is usually regarded as having an interest in the so-called "servient tenement" which ordinarily is not revocable and which is enforceable against the owner of the "servient tenement" as well as against strangers who interfere therewith. The holder of a license, on the other hand, is ordinarily not regarded as holding any interest in the land upon which the license

is to be exercised. Ordinarily, the license is revocable in the absence of further modifying circumstances sometimes characterized as involving elements of contract or of estoppel. Even though a license may through such means become technically irrevocable, it still does not confer "an interest in land" as the term is ordinarily understood and applied. For more extended analytical discussion of the concepts involved in licenses in real property, see Clark, *Covenants and Interests running with the Land* (1929), pp. 8–51.

At pages 7–8 of the opening brief of the United States certain authorities from the state of Washington and from other jurisdictions were cited in which such franchises as are involved in the present case were characterized as licenses or permits. In footnote 4 at page 10 of the Government's brief are cited the leading Washington authorities showing that a franchise to maintain an electric transmission line in a public highway involves no added burden to the highway easement for which the abutting property owners are entitled to compensation. The Washington statute which authorizes the granting of such franchises as are involved in the present case does not purport to authorize a conveyance of any interest in the soil of the highway but states that the County Commissioners "may grant authority for the construction, maintenance, and operation of transmission lines for transmitting electric power, together with poles, wires, and other appurtenances, upon, over, along, or across any such public streets or road, and

in granting such authority * * * may prescribe the terms and conditions on which such transmission line and its appurtenances shall be maintained and operated." Remington, Revised Statutes of Washington, sec. 5430. Washington cases annotated under this section have treated the franchise granted under the authority of this statute as contractual in nature. *Castle Rock* v. *Furth,* 78 Wash. 47, 138 Pac. 317 (1914); *Tacoma Ry. & Power Co.* v. *City of Tacoma,* 79 Wash. 508, 140 Pac. 565 (1914). That the Washington Constitution forbids the granting of an irrevocable or exclusive franchise to a private utility, see Art. I, secs. 8, 12; Art. XII, sec. 1. In the state of Massachusetts, which, like the state of Washington, regards such franchises as involving no added burden to the highway easement (*New England Tel. & Tel. Co. of Mass.* v. *Boston Terminal,* 182 Mass. 397, 65 N. E. 835 (1913)), it has been stated outright that such a franchise granted by a private landowner to the telephone company is a mere license and the franchise holder a licensee. *Nelson* v. *American Tel. & Tel. Co.,* 270 Mass. 471, 171 N. E. 416 (1930).

Moreover, the Washington statutes providing for the taxation of personal property have been held to include franchises. See *Commercial Elec. Light & Power Co.* v. *Judson,* 21 Wash. 49, 56 Pac. 829, 831 (1899). Indeed, in this connection, the statutory langauge itself classifies franchises as personal property. See Remington, Rev. Stats. of Wash., sect. 11,199 ("* * * franchises, royalties, and other personal property"). See also secs. 11,157 and 11,161. Under

section 520, too, it is provided that all franchises of every kind and nature heretofore or hereafter granted shall be subject to sale upon execution and upon order of sale issued upon foreclosure of mortgage, "in the same manner as any other personal property * * *."

Certain other jurisdictions have treated such a franchise as an additional burden on the highway easement and have required the public utility to compensate the abutting owner for the additional burden. In such states the utility thereby acquires an interest in the highway. See, notably, *New York Telephone Co.* v. *State,* 154 N. Y. Supp. 1059 (1915), where this position not only is examined at length but is distinguished from, and contrasted with, the line of authority which in this respect is followed in the state of Washington. To the same effect in this regard see *Thompson* v. *Orange & Rockland Elec. Co.,* 254 N. Y. 366, 173 N. E. 224 (1930); *Gurnsey* v. *Northern California Power Co.,* 160 Calif. 699, 117 Pac. 906 (1911); *Chesapeake & Potomac Telephone Co.* v. *Tyson,* 160 Md. 298, 153 Atl. 271 (1931). Under this line of authority it has sometimes been said that such franchises when exercised become easements. See *Consolidated Gas Co.* v. *Mayor, etc., of the City of Balto.,* 101 Md. 541, 61 Atl. 532, 534 (1905) (appellee's br., p. 5); *Stockton Gas & Elec. Co.* v. *San Joaquin Co.,* 148 Calif. 313, 83 Pac. 54, 56 (1905) (appellee's brief, p. 5).

It is therefore not correct to state (appellee's brief, p. 6) that franchise rights constitute an interest in

land in the state of Washington. The two cases cited by appellee for that position are from California and Maryland, jurisdictions which hold, contrary to the Washington decisions, that such franchises constitute added burdens on the highway easement. The Washington cases cited in appellee's brief, pp. 6 and 7, manifestly do not support the asserted position that franchise rights constitute an interest in land. One may look in vain in the opinion in *Commercial Elec. Light & Power Co.* v. *Judson,* 21 Wash. 49, 55, 56 Pac. 829 (1899), for any statement that such a franchise is an interest in land. The opinion treats such a franchise as personalty, following in this respect the language of the state statutes. The case of *Great Northern Ry. Co.* v. *Seattle,* 180 Wash. 368, 39 P. 999 (1935), is not a decision that such a franchise is an interest in land but that the franchise is a property right which may not be "taken or damaged" without the payment of compensation, a position required by the "or damaged" provision of the Washington Constitution (Art. I, sec. 18), as explained in the Government's opening brief, p. 15. The dictum quoted (appellee's brief, p. 7) from *Dunsmuir* v. *Port Angeles Gas, Water, Electric Light & Power Co.* does not touch in any manner the character of the franchise whether as an interest in land or as personalty. It merely suggests the propriety under certain circumstances of treating the physical equipment, the pipes and mains laid in the city streets, as appurtenances to the realty of the utility company's central plant rather than as part of the realty of streets of the city through which they were laid.

At page 9 of appellee's brief, in order to avoid the application of cases cited in the Government's opening brief, it is asserted that the franchise involved in the present case is not revocable. Appellee has apparently overlooked that part of the Washington Constitution cited in the Government's brief at page 8, footnote 3, prohibiting the granting of an irrevocable franchise. On the question of whether the defendant's franchise was an easement or a license, does it matter that the grantor of the defendant's revocable privilege was not also the condemner? Is the franchise in the present case a license or an easement, as the case may be, contingent upon the purely fortuitous circumstances of whether it is the state of Washington or the United States that in the instance exercises the power to condemn? In *Warr* v. *London County Council* (1904), 1 K. B. 713, already discussed above, the condemner was a "stranger" to the concession in the theatre which was held not to be an "interest in land."

APPELLEE'S POINTS III AND IV

Appellee's contention (Br. 9–11) that upon condemnation of public highways compensation may be recovered is misleading. We agree that compensation may be recovered but only by those who have an actual interest in the highway (the public authorities, abutting landowners, etc.). The cases cited in appellee's subdivisions (a) and (b) are, without exception, cases where the claimant actually was the holder of the public highway easement (the county, town, or state as the case might be), and not, as in

the present case, a utility company whose only property interest in that regard is a license to share in the use of the county's public highway easement. In the present case the United States joined as a defendant King County, the holder of the public highway easement condemned in this proceeding (R. 2, 19). Its claim is not in issue on this appeal. The three decisions cited in appellee's subdivision (c) (p. 11) do not support appellee's claim in the present case. *New York Telephone Co.* v. *State,* 154 N. Y. S. 1059 (1915), is a case decided under the law of the State of New York where the utility company's transmission line in the highway is held to involve an additional easement or servitude beyond that involved in the public highway easement, a position which has been decisively rejected in the State of Washington (Govt. Op. Br., pt. 10, footnote 4). *Petition of Gillespie,* 32 N. Y. S. 2d 96 (1942), is another New York case, which also involves the additional feature that a special statute there required compensation to be paid by the city not only for property taken but also for loss incurred. No such statute is applicable to the United States in the present case. The case of *United States* v. *Boston Elevated Ry. Co.,* 176 Fed. 963 (1910), holds that the United States could not enjoin the construction of the company's subway in the street area of the city of Cambridge, undertaken under authority from the city, where the United States had not condemned the street area in question but was merely in occupation under a license which had been revoked. The case

does not decide that if the United States did condemn in such a case it must make compensation not only to the holder of the public highway easement but also to a party having merely a license to share in the use of that public highway easement.

Similarly, the cases cited by appellee under Point IV (Br. 11–12) are cases where the claim was interposed by the holder of the public highway easement (the city authorities), being in that respect comparable to King County in the present case. In none of these cases was a claim sustained in favor of the holder of a mere license to share in the use of the county's or town's public highway easement.

APPELLEE'S POINT V

The cases cited on this point (Br. 12) do not bear out appellee's claim in the present case. The expressions relied upon by appellee in these cases in substance all adopt the position taken by the Supreme Court of the United States in case of *City of Los Angeles* v. *Los Angeles Gas & Elec. Corp.,* 251 U. S. 32 (1919). In that case an irrevocable franchise constituted a valid contract, the obligation of which could not constitutionally be impaired by the state or its political subdivisions, the acts challenged being found not to be within the reasonable exercise of police power. Obviously, such decisions have no application to frustration of contractual obligations by the United States through condemnation proceedings. See Govt. Op. Br., pp. 14, 16–18.

APPELLEE'S POINT VI

As indicated in the Government's opening brief (pp. 14–19), "frustration and appropriation are essentially different things." The proposition stated in appellee's point VI (Br. 13) is substantially accurate only under constitutional or statutory provisions requiring compensation for property "taken or damaged" (Govt. Op. Br., p. 15). The case *City of Belleville* v. *St. Clair County Turnpike Co.*, 234 Ill. 428, 84 N. E. 1049 (1908), arose under such a constitutional provision. In the case of *Peabody* v. *United States,* 231 U. S. 530 (1913), the court held there was no "taking." That case by dictum reaffirmed *United States* v. *Welch,* 217 U. S. 333 (1910), which was a case of flooding the physical property, not a case of frustration of the contract rights of a licensee to share in the use of a public highway easement. The case of *Morrison* v. *Clackamas County,* 141 Ore. 564, 18 P. 2d 814 (1933), too, was a case of flooding of the physical property. If there is any conflict between any of the pronouncements contained in the opinion in that case and the holding of the Supreme Court of the United States in the contract frustration cases cited in the Government's original brief (pp. 14–19) it is submitted that the authority of the Supreme Court of the United States rather than that of the Supreme Court of Oregon is controlling in the present proceeding.

APPELLEE'S POINT VII

The Government finds no occasion in the present case to explore the question of to what extent and

under what circumstances the meaning of the term "property" is to be found by reference to other criteria than local law. As said in the case of *United States* v. *Powelson,* 319 U. S. 266 (1943), "it will normally obtain its content by reference to local law." The Washington law in the instant case makes it clear that appellee's franchise is not a property right in Bile Street (Govt. Op. Br., pp. 7–10, 15, *supra,* pp. 2–9).

APPELLEE'S POINT VIII

The application to the present case of the decisions cited on severance damages depends upon the question of whether appellee had property interests in Bile Street which were taken by the United States. None such being found, the doctrine of severance damages, as shown in the Government's opening brief (pp. 18–19), is not applicable. The only new suggestion made in this respect is appellee's assertion (Br. 14) that "Its electric line in Bile Street was connected with its generating plants and by reason of such connection, if for no other reason, was an interest in land." It is sufficient answer to say that if that suggestion is to be indulged, the "land" of which this electric line was a part was not Bile Street but the realty on which the central plant was located, which was not taken by the United States in these proceedings. In this connection the following quotation seems pertinent: "We do not understand that the learned counsel for the respondent claims that they [water pipes and mains] really became fixtures by reason of their having been laid underground or through the

streets of the city; for, if it be true that they thereby became fixtures, the ownership thereof was thus transferred to the proprietor of the land to which they were affixed, which the respondent does not concede." *Dunsmuir* v. *Port Angeles Gas, Water, Light and Power Co.,* 24 Wash. 104, 63 Pac. 1095, 1098 (1901).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the district court erred in awarding the appellee $408.98, together with interest, for the expenses which it incurred in rebuilding a transmission line which it formerly operated on Bile Street under a franchise from King County. Any allowance for such expenditures should be stricken from the judgment, and the judgment as so modified should be affirmed.

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